

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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J. DOE, a minor, by and through Jane Doe,

Case No. 3:23-cv-00107-MMD-CSD

**Plaintiff,**

## ORDER

v.

WASHOE COUNTY SCHOOL DISTRICT,  
a political subdivision of the State of  
Nevada; DOES I-XX; and ROES I-XX,

### Defendants.

## I. SUMMARY

Defendant Washoe County School District (“WCSD”) moves to dismiss (ECF No. 32 (“Motion”)) the first amended complaint (ECF No. 31 (“FAC”)) filed by J. Doe (“Plaintiff”), a minor, by and through Jane Doe.<sup>1</sup> The Court will grant the Motion because Plaintiff’s FAC fails to cure numerous deficiencies the Court<sup>2</sup> identified in a prior order dismissing the initial complaint. (ECF No. 30 (“Dismissal Order”).) The Court dismisses the first through fourth causes of action with leave to amend and the fifth and sixth causes of action in the FAC with prejudice.

## **II. BACKGROUND**

Plaintiff alleges his classmates at Jerry Whitehead Elementary School (“Whitehead Elementary”) in WCSD bullied and discriminated against him. (ECF No. 31 at 4-6.) At all times relevant to the FAC, Plaintiff was 9 to 10 years old. (*Id.* at 6.)

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<sup>1</sup>Plaintiff opposed (ECF No. 35) and WCSD replied (ECF No. 36).

<sup>2</sup>United States District Judge Larry R. Hicks issued the order the Court is referring to. (ECF No. 30.) This case was later reassigned to the Court. (ECF No. 38.) The Court interchangeably refers to Judge Hicks and itself as the Court in the remainder of this order.

Plaintiff received accommodations at Whitehead Elementary because he experienced anxiety, tachycardia, and cyclical vomiting. (*Id.* at 11.) Beginning “about November 2021 through the present day,” Plaintiff “was subjected to a pattern and practice of systematic bullying based on his perceived sexual orientation, gender identity[,] and disabilities . . . includ[ing] daily taunting by students, mocking his clothing, accessories, behavior, and belittling him based upon his perceived sexual orientation and gender identity.” (*Id.* at 7, 10.) As early as March 2019, Plaintiff’s parents reported the bullying to WCSO. (*Id.* at 7.) Unidentified “faculty and/or staff” ignored “said reports.” (*Id.*)

On February 23, 2022, a “minor student aggressor” allegedly attacked Plaintiff in the bathroom at Whitehead Elementary. (*Id.* at 6.) The student choked Plaintiff, chased him with a pencil, and threatened to stab him. (*Id.*) The student allegedly continued this behavior at a “park adjacent to the school.” (*Id.*) On August 29, 2022, the Second Judicial District Court of Nevada issued a temporary protection order (“TPO”) against the minor student aggressor. (*Id.* at 8.) A hearing was set to determine whether to extend the TPO otherwise it would expire on September 27, 2022—the same day as the hearing.<sup>3</sup> (ECF No. 32-1 at 2.)

The TPO prohibited the minor student aggressor from threatening, physically injuring, harassing, contacting Plaintiff, or coming within 100 yards of his residence. (*Id.* at 2-4.) While the TPO further prohibited the student from coming within 100 yards of Whitehead Elementary, it expressly provided an exception allowing the student to attend

<sup>3</sup>Under the doctrine of incorporation by reference, the Court considers the TPO document without converting WCSD's motion to dismiss into a motion for summary judgment. Normally, if a district court considers evidence outside the pleadings when addressing a motion to dismiss under Federal Rule of Procedure 12(b)(6), the court must convert the motion to dismiss into a motion for summary judgment under Federal Rule of Civil Procedure 56 and give the nonmoving party an opportunity to respond. See *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003) (citing FED. R. CIV. P. 12(b)). However, a court may consider documents incorporated by reference into a complaint without converting a motion to dismiss into a motion for summary judgment if the plaintiff refers extensively to the document(s) or when the document forms the basis of the plaintiff's claims. See *id.* at 907-08. Here, Plaintiff references the TPO extensively throughout the FAC, and Plaintiff brings the claims in the FAC with the TPO as a basis for those claims. Thus, the doctrine of incorporation by reference applies, and the Court considers the TPO document in resolving the Motion without converting WCSD's Motion into a motion for summary judgment.

1 Whitehead Elementary for legitimate scholastic and extracurricular activities so long as  
 2 he had no contact with Plaintiff. (*Id.* at 5.) Plaintiff alleges that WCSD allowed the bullying  
 3 “to persist over the next four months” by refusing to enforce the terms of the TPO or  
 4 “follow mandated protocols regarding adequate and reasonable mitigation of the  
 5 situation.” (ECF No. 31 at 8-9.) Instead, unidentified WCSD faculty and administrators  
 6 retaliated against Plaintiff “for disclosing to his parents the conditions at school.” (*Id.* at  
 7 8.) WCSD failed to report any of the incidents for investigation. (*Id.* at 9.) As the “pervasive  
 8 acts continued, [Plaintiff] was subject[ed] to additional physical and sexual assault and  
 9 battery by the minor student abuser” and “additional discrimination on the basis of his sex  
 10 and disability by” unidentified WCSD employees. (*Id.*)

11 Plaintiff and Jane Doe, in her individual capacity as well as in her capacity as  
 12 Plaintiff’s guardian, sued WCSD, the Washoe County School District Board of Trustees,  
 13 and Washoe County School District Superintendent Dr. Susan Endfeld. (ECF No. 1 at 4.)  
 14 On a stipulation, the Court dismissed the Board and Superintendent as defendants,  
 15 leaving WCSD as the only Defendant. (ECF No. 27 at 2.)

16 The Court subsequently granted WCSD’s motion to dismiss the initial complaint.  
 17 (ECF No. 30 at 13.) The Court dismissed with prejudice both Jane Doe in her individual  
 18 capacity as a party to this action and the first cause of action requesting declaratory relief.  
 19 (*Id.* at 3-5.) The Court further dismissed without prejudice the second through seventh  
 20 causes of action with leave to amend to cure the deficiencies described in the Dismissal  
 21 Order. (*Id.* at 5-13.) Plaintiff then filed the FAC. (ECF No. 31.)

22 In the FAC, Plaintiff alleges: (1) violation of the Equal Protection Clause of the  
 23 Fourteenth Amendment; (2) violation of the Procedural Due Process Clauses of the Fifth  
 24 and Fourteenth Amendments; (3) *Monell*<sup>4</sup> liability; (4) discrimination in violation of Title IX  
 25 of 20 U.S.C. § 1681 (“Title IX”); (5) negligence; and (6) intentional infliction of emotional  
 26 distress (“IIED”). (*Id.* at 14-30.)

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<sup>4</sup>See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

1     **III. DISCUSSION**

2               WCSD seeks dismissal under Rule 12(b)(6), contending the FAC contains the  
 3 same deficiencies identified in the Court's Dismissal Order.<sup>5</sup> (ECF No. 32 at 10-11.) The  
 4 Court agrees and will dismiss Plaintiff's fifth and sixth causes of action with prejudice.<sup>6</sup>  
 5 However, Plaintiff outlines new theories of liability in the first and second causes of action  
 6 (ECF No. 31 at 14-20), another *Monell* claim under the third cause of action (*Id.* at 21-  
 7 23), and an altered Title IX claim in his fourth cause of action (*Id.* at 23-25). The Court will  
 8 address these theories in turn.

9     **A. *Monell* Claims**

10              Under *Monell*, “[a] government entity may not be held liable under 42 U.S.C.  
 11 § 1983, unless a policy, practice, or custom of the entity can be shown to be a moving  
 12 force behind a violation of constitutional rights.” *Dougherty v. City of Covina*, 654 F.3d  
 13 892, 900 (9th Cir. 2011) (citing *Monell*, 436 U.S. at 694). “In order to establish liability for  
 14 governmental entities under *Monell*, a plaintiff must prove ‘(1) that [the plaintiff] possessed  
 15 a constitutional right of which he was deprived; (2) that the municipality had a policy; (3)  
 16 that this policy amounts to deliberate indifference to the plaintiff’s constitutional right; and,  
 17 (4) that the policy is the moving force behind the constitutional violation.’” *Id.* at 900

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19              <sup>5</sup>One of these deficiencies is the party’s name. The Court dismissed Jane Doe, in  
 20 her individual capacity, with prejudice in the Dismissal Order. (ECF No. 30 at 13.) In  
 21 response to WCSD’s Motion, Plaintiff asserts he amended the initial complaint in  
 22 conformity with the Dismissal Order. (ECF No. 35 at 3-6.) However, deficiencies as to  
 23 Jane Doe that the Court described in the Dismissal Order are still present in the FAC,  
 24 such as referring to “Plaintiff” in both the plural and singular (ECF No. 31 at 1, 2, 18, 23,  
 25 27, 28, 29, 30) and including Jane Doe as a plaintiff despite her being dismissed in  
 26 the Dismissal Order (*Id.* at 28). The Court reminds Plaintiff that these deficiencies must  
 27 be cured if he chooses to file a second amended complaint.

28              <sup>6</sup>Plaintiff asserts nearly the exact same negligence per se claim that the Court  
 29 dismissed. (ECF Nos. 31 at 25-28; 1 at 7-8.) Plaintiff’s IIED claim is likewise identical in  
 30 all meaningful ways to the claim asserted in the initial complaint that the Court dismissed.  
 31 (ECF Nos. 31 at 28-30; 1 at 29-30.) The Court will therefore dismiss these claims with  
 32 prejudice because Plaintiff repeatedly failed to cure pertinent deficiencies described in  
 33 the Dismissal Order (ECF No. 30 at 10-12), and no amendments elsewhere in the FAC  
 34 provide sufficient factual allegations to support a negligence per se or IIED claim. See  
*Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 532 (9th Cir. 2008) (noting that a  
 35 court may deny leave to amend when a party repeatedly fails to cure deficiencies by  
 36 amendments previously allowed).

1 (quoting *Plumeau v. Sch. Dist. No. 40 Cnty. of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997)).  
 2 A plaintiff must include plausible factual allegations showing that the municipal defendant  
 3 had actual or constructive notice that its inaction would likely result in a constitutional  
 4 violation. See *Tsao v. Desert Palace, Inc.*, 698 F.3d 1143, 1145 (9th Cir. 2012).

5 In the first and second causes of action, Plaintiff attempts to plead facts supporting  
 6 the policy element of a *Monell* claim based upon a theory that WCSD has policies of  
 7 inaction.<sup>7</sup> (ECF No. 31 at 14-20.) For the third cause of action, Plaintiff bases *Monell*  
 8 liability on a theory that a WCSD official with final policymaking authority ratified the  
 9 alleged violations of Plaintiff's constitutional rights. (*Id.* at 21-23.) These claims fail  
 10 because the FAC does not contain sufficient factual matter, accepted as true, to support  
 11 the elements of a *Monell* claim. The Court will accordingly dismiss these causes of action  
 12 with leave to amend.

### 13           **1. First Cause of Action**

14 In his first cause of action, Plaintiff claims that WCSD violated his rights under the  
 15 Equal Protection Clause by "allow[ing] the perpetual harassment and abuse to continue  
 16 at school." (*Id.* at 14.) Plaintiff contends that WCSD "demonstrated deliberate  
 17 indifference" by "refusing to report instances of abuse and harassment." (*Id.* at 17.) But  
 18 Plaintiff's allegations are sparse and lack sufficient facts to state a claim; he provides only  
 19 one example of WCSD allegedly ignoring a report of bullying beyond broad accusations  
 20 lacking requisite factual context, which alone is insufficient to support the existence of a  
 21 policy. (*Id.* at 6-7.) Plaintiff also contends that WCSD "demonstrated deliberate  
 22 indifference . . . by refusing to follow the requirements in the ordered TPO." (*Id.* at 17.)  
 23 However, Plaintiff does not allege in the FAC that a court extended the TPO beyond  
 24 September 27, 2022, nor does Plaintiff allege requisite factual context. For example, the  
 25 FAC does not state the way WCSD refused to follow the requirements in the TPO issued

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 27           <sup>7</sup>Plaintiff's first and second causes of action are Section 1983 claims against  
 28 WCSD. (ECF No. 31 at 14-20.) Section 1983 claims brought against a municipal entity  
 are recognized as *Monell* claims. See, e.g., *City of Los Angeles v. Heller*, 475 U.S. 796,  
 799 (1986). The Court accordingly analyzes these claims under the *Monell* standard.

1 against the minor student aggressor, when WCSD did so, or how doing so violated  
 2 Plaintiff's rights under the Equal Protection Clause. Instead, Plaintiff simply alleges that  
 3 WCSD ignored the TPO, allowing the bullying "to persist over the next four months." (*Id.*  
 4 at 9.) Without more than these vague assertions, the FAC does not contain sufficient  
 5 allegations, accepted as true, to avoid dismissal.<sup>8</sup>

## 6           **2. Second Cause of Action**

7 Plaintiff then alleges that WCSD violated his rights under the Due Process Clause  
 8 by "fail[ing] to comply with [WCSD] Policies."<sup>9</sup> (*Id.* at 19.) Plaintiff lists the titles of anti-  
 9 bullying policies and regulations implemented by WCSD and alleges that WCSD's failure  
 10 to punish the minors bullying Plaintiff created an environment where this treatment  
 11 became acceptable. (*Id.*) Yet without more than vague allegations, Plaintiff again fails to  
 12 sufficiently allege the requisite deliberate indifference. For example, Plaintiff does not  
 13 allege sufficient facts upon which a reasonable factfinder could determine which of the  
 14 listed policies and regulations WCSD failed to implement, how, where, or when it failed  
 15 to do so, or how WCSD had notice that any such failure would likely result in a violation  
 16 of Plaintiff's rights under the Due Process Clause.

17 Additionally, while the FAC contains allegations relating to the singular bathroom  
 18 incident, it does not describe any other occurrences of harassment, allege the existence  
 19 of other aggressors, or allege any additional incidents of bullying in the FAC that would  
 20 support Plaintiff's claim that WCSD's "failure to mitigate and discipline the offending  
 21 minors in accordance with [WCSD] Board policies, allowed the pervasive abuse to

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 23           <sup>8</sup>Plaintiff also includes a factually impossible assertion that unidentified faculty and  
 24 staff at WCSD ignored a report provided by Plaintiff's parents in March 2019, concerning  
 bullying that began occurring "about November 2021." (ECF No. 31 at 7, 10.)

25           <sup>9</sup>In the FAC, Plaintiff, for the first time, asserts his second cause of action against  
 26 WCSD under the Procedural Due Process Clause of both the Fifth Amendment to the  
 27 United States Constitution and the Fourteenth Amendment. (ECF No. 31 at 18-20.)  
 28 However, Plaintiff's second cause of action fails as a matter of law insofar as Plaintiff  
 relies on the Due Process Clause because WCSD is not a federal government entity, and  
 the Due Process Clause applies to and restricts only the federal government. See *Geneva  
 Towers Tenants Org. v. Federated Mort. Inv.*, 504 F.2d 483, 487 (9th Cir. 1974).

1 continue and fomented an environment wherein such abuse was acceptable." (*Id.* at 6-7,  
 2 19.) Again, Plaintiff does not allege the requisite factual matter.

3           **3. Third Cause of Action**

4           Finally, Plaintiff attempts to plead facts supporting the policy element of a *Monell*  
 5 claim in his third cause of action based on a theory that a WCSD official with final  
 6 policymaking authority ratified the alleged violations of Plaintiff's constitutional rights. (*Id.*  
 7 at 21-23.) A plaintiff may establish the policy element of a *Monell* claim by demonstrating  
 8 that the individual tortfeasor "was an official with final policy-making authority or such an  
 9 official ratified the unconstitutional decision or action and the basis for it." *Gordon v. Cnty.*  
 10 *of Orange*, 6 F.4th 961, 973 (9th Cir. 2021) (citations omitted). But before a municipal  
 11 employer may be held liable under a theory that an official with final policymaking authority  
 12 ratified the unconstitutional decision or action and the basis for it, the plaintiff must  
 13 demonstrate that the named official had final policymaking authority for purposes of  
 14 municipal liability. *See Cortez v. County of Los Angles*, 294 F.3d 1186, 1188-89 (9th  
 15 Cir. 2002).

16           Plaintiff fails to plausibly allege that a WCSD official with final policymaking  
 17 authority ratified the alleged violations of Plaintiff's constitutional rights and the basis for  
 18 those violations, though Plaintiff claims that unknown policy makers allowed "for the  
 19 pervasive and blatant violation of student's constitutional rights." (ECF No. 31 at 21.) But  
 20 Plaintiff does not name a policy maker and admits that he cannot identify any for purposes  
 21 of the claim. (*Id.*) Moreover, Plaintiff does no more than provide vague, conclusory  
 22 allegations that "WCSD have [sic] ratified, condoned, approved, and encouraged the use  
 23 [of] retaliatory acts by its administrators, faculty, and teachers." (*Id.* at 22.) Plaintiff's third  
 24 cause of action accordingly does nothing more than set forth a series of legal conclusions  
 25 void of the requisite factual allegations. (*Id.* at 21-23.) This does not suffice.

26           In sum, Plaintiff's FAC fails to allege sufficient facts supporting a *Monell* claim  
 27 because it alleges only vague and conclusory allegations. However, what Plaintiff alleges  
 28 could be a valid *Monell* theory—namely that WCSD has policies of inaction and that a

1 WCSD official with final policymaking authority ratified Plaintiff's alleged constitutional  
 2 violations—if it was supported by sufficient facts. See *Tsao*, 698 F.3d at 1143-44.  
 3 Therefore, because the Court cannot find that amendment is futile, dismissal of these  
 4 claims is with leave to amend to cure these deficiencies.

5       **B. Title IX Claims**

6       In the Dismissal Order, the Court dismissed without prejudice Plaintiff's fourth  
 7 cause of action alleging violations of his rights under Title IX. (ECF No. 30 at 13.) Plaintiff  
 8 again attempts to allege a Title IX claim in his fourth cause of action but fails to plausibly  
 9 allege the required elements. (ECF No. 31 at 23-25.) The Court therefore dismisses the  
 10 claim with leave to amend.

11       Under Title IX, “[n]o person in the United States shall, on the basis of sex, be  
 12 excluded from participation in, be denied the benefits of, or be subjected to discrimination  
 13 under any education program or activity receiving Federal financial assistance.” 20 U.S.C.  
 14 § 1681(a). Title IX includes a private right of action against federal fund recipients for  
 15 discrimination based on sex, sexual orientation, or perceived sexual orientation. See  
 16 *Grabowski v. Ariz. Bd. of Regents*, 69 F.4th 1110, 1115-16 (9th Cir. 2023). The *Grabowski*  
 17 court also suggested that a viable Title IX claim could be based on allegations that the  
 18 harassers perceived the victim as not conforming to traditional gender norms. See *id.* at  
 19 1117-19. Plaintiff presents two theories of Title IX liability: student-on-student sexual  
 20 harassment and retaliation. (ECF No. 35 at 13-15.) The Court addresses each  
 21 theory in turn.

22       **1. Sexual Harassment**

23       A plaintiff may allege “a Title IX claim against a school that arises from student-on-  
 24 student . . . sexual harassment or assault” as Plaintiff appears to allege here. See *Karasek*  
 25 *v. Regent of Univ. of Cal.*, 956 F.3d 1093, 1105 (9th Cir. 2020). But to do so, a plaintiff  
 26 must plausibly allege that “(1) the educational institution had substantial control over both  
 27 the harasser and the context in which the known harassment occurs; (2) that the  
 28 harassment was so severe, pervasive, and objectively offensive that it denied its victims

1 the equal access to education that Title IX is designed to protect; (3) that a school official  
2 with authority to address the alleged discrimination and to institute corrective measures  
3 has actual knowledge of the discrimination; (4) that the school acted with deliberate  
4 indifference to the harassment; and (5) that the school's deliberate indifference must, at  
5 a minimum, cause students to undergo harassment, or make them liable or vulnerable to  
6 it." See *Brown v. Arizona*, 82 F.4th 863, 874 (9th Cir. 2023) (internal quotation marks and  
7 citations omitted) (citing *Grabowski*, 69 F.4th at 1120).

8 To support his Title IX sexual harassment claim, Plaintiff alleges that "despite being  
9 reported . . . [to] faculty and staff at Whitehead," he "was subject[ed] to extreme and  
10 pervasive harassment by a group of students," including "taunting based on his sexuality  
11 . . . [and] perceived sexual orientation." (ECF No. 31 at 6.) The FAC once again fails to  
12 allege sufficient facts supporting the necessary elements of a Title IX claim. For example,  
13 Plaintiff does not allege specific details of when or where the harassment by the  
14 unidentified group of students occurred other than conclusory assertions that it happened,  
15 and while under the supervision of WCSD staff. It also does not contain sufficient factual  
16 allegations to support a claim that a WCSD official with authority to address the alleged  
17 harassment had actual knowledge of the discrimination; the allegations that unidentified  
18 staff ignored reports of discrimination are too unclear for the Court to discern who  
19 provided the reports, approximately when the reports were provided, and what  
20 information was provided in the report. (*Id.*) Without more, Plaintiff cannot allege sufficient  
21 facts to support the elements of a Title IX sexual harassment claim.

## 22           **2.       Retaliation**

23           "To establish a prima facie claim of retaliation under Title IX, a plaintiff must allege  
24 that (1) the plaintiff participated in a protected activity, (2) the plaintiff suffered an adverse  
25 action, and (3) there was a causal link between the protected activity and the adverse  
26 action." *Grabowski*, 69 F.4th at 1120 (citation omitted). To support a Title IX retaliation  
27 theory, Plaintiff alleges that "[he was] retaliated against as [he was] denied privileges" and  
28

1 WCSD “retaliated against him by segregating and isolating him as a result of the  
2 harassment, assault, and bullying.” (ECF No. 35 at 14.)

3 Plaintiff again fails to plead sufficient facts to support the necessary elements of a  
4 Title IX retaliation claim. He alleges that WCSD denied him privileges and isolated him  
5 because of the harassment, but the Court cannot discern who did this, when, or how from  
6 the factual allegations in the FAC and therefore cannot determine whether a reasonable  
7 person would have been dissuaded from complaining of discrimination by the action taken  
8 by anyone at Whitehead Elementary. (ECF No. 31 at 16.) The Court also cannot  
9 determine the proximity in time between any protected action and any alleged retaliation  
10 to determine a causal link. Lacking these details, Plaintiff has not alleged sufficient facts  
11 to support a Title IX retaliation claim.

12 Plaintiff therefore fails to allege sufficient facts to support a Title IX claim, instead  
13 providing only bare and conclusory allegations. The Court accordingly dismisses  
14 Plaintiff’s Title IX claim. However, dismissal of this claim is with leave to amend because  
15 the Court cannot find that amendment is futile; Plaintiff’s bullying allegations and  
16 subsequent inaction from WSCD could support a Title IX claim with sufficient facts. See  
17 *Grabowski*, 69 F.4th at 1118-19, 1121-22.

18 **IV. CONCLUSION**

19 The Court notes that the parties made several arguments and cited several cases  
20 not discussed above. The Court reviewed these arguments and cases and determines  
21 that they do not warrant discussion as they do not affect the outcome of the Motion before  
22 the Court.

23 It is therefore ordered that Defendant WCSD’s motion to dismiss (ECF No. 32) the  
24 FAC (ECF No. 31) is granted. The first through fourth causes of action are dismissed with  
25 leave to amend because the Court cannot find that amendment would be futile. The fifth  
26 and sixth causes of action are dismissed with prejudice because Plaintiff repeatedly failed  
27 to cure deficiencies.

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1        It is further ordered that Plaintiff is granted leave to file a second amended  
2 complaint within 30 days from the date of entry of this order if he believes he may cure  
3 the identified deficiencies.

4        If Plaintiff does not timely file a second amended complaint consistent with this  
5 order, the Court will dismiss the first through fourth causes of action with prejudice without  
6 further advance notice to Plaintiff.

7        DATED THIS 14<sup>th</sup> Day of November 2024.



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MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE